No. 3690

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GEORGE U. HIND and JAMES ROLPH, Jr.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY (a corporation),
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division

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Press of The James H. Barry Co.

INDEX

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The action is for damages for error in the transmission of a telegram relating to the sale of a shipload of barley. A jury was waived and the cause submitted to the Court upon an Agreed Statement of Facts. Judgment was rendered for the defendant.

The defenses are:

(1) Plaintiffs sustained no loss.

(2) Plaintiffs had cause to know of the error in the message before accepting the offer.

(3) Plaintiffs are bound by the terms and conditions of the message contract and established regulations as to limited liability.

STATEMENT OF FACTS

Plaintiffs, who were grain merchants at San Francisco, were negotiating in February, 1916, with Green & Co., their agents in London, England, respecting the sale of a shipload of barley. On February 24 they sent a message from San Francisco to Green & Co., London, offering a cargo at 63s. 9d. per quarter, including the war risk insurance, meaning thereby that the plaintiffs, the sellers, would pay such insurance (Agreed Statement, Par. V, Trs., p. 25). The cargo consisted of 15,105 quarters of barley of 448 pounds each. Exchange at that time being $4.76 per English pound (Agreed Statement, Par. XIX), this offer, if accepted, would have yielded plaintiffs $229,180 gross or *$222,210* net, after paying the war risk of $6,970. Green & Co. replied by the message of February 25th, being the message in suit, by which they stated to plaintiffs that *buyers declined the offer,* but submitted a counter offer to purchase the barley for 62s. 6d. including the war risk, meaning thereby that such insurance should be paid by the plaintiffs as in the first offer. This message is set out in Paragraph VI of the Agreed Statement, Trs., p. 25. The message was correctly transmitted by cable from London to New York, but in its transmission over the lines of defendant from New York to San Francisco the word "not" was inserted before the words "including war risk," indicating to the plaintiffs that the war risk would be paid by the buyers. At 62s. 6d. per quarter the cargo (provided

the war risk were paid by the buyers), would have yielded plaintiffs $224,686, or $2456 more than plaintiffs asked for the barley. The message as delivered thus made the buyers' offer also appear to be greater than the price which in the same message they declined. The plaintiffs without inquiry accepted this counter offer and received the price of 62s. 6d., from which, however, they were required to pay the war risk of $6970.54. This price received yielded plaintiffs a net profit of $30,000 on the cargo after allowing for the payment of the war risk insurance (Agreed Statement, Par. X).

It was further stipulated as follows with respect to the price actually received by the plaintiffs (See Agreed Statement, Par. XI):

> "That there was no particular market price for Superior Barley on or about the 25th of February, 1916, but the price stated on said message set forth in Paragraph VI, *was the best price which said F. Green & Co. could secure at that date.*"

The message in suit was written on one of the regular blanks of the Western Union Telegraph Company, used in transmitting cablegrams, which defined the conditions under which the message was received for transmission and described the rates, liability and obligation of the defendant, *to which conditions the plaintiffs, through their agent, agreed* (Par. XIV of Stipulation). Among other terms in this contract was the condition that the company should not be

liable beyond the amount paid for sending the same for any loss or damage resulting through error in the transmission of the message. It was further stipulated in the Agreed Statement, Par. XVI, that pursuant to the Act to Regulate Commerce, approved June 18, 1910 (24 Stat. L. 379), relating to the classification of telegraph messages,

> "the defendant had on and prior to the 25th day of February, 1916, *established classifications of such telegraph messages* into the various classes referred to in said Act, and among others, *into repeated and unrepeated messages,* and had established different rates of toll with respect to such classes of messages, and had filed said rates and regulations with said Interstate Commerce Commission."

It was further stipulated that said message was sent and paid for as an *unrepeated message* under the conditions set forth in said contract (Agreed Statement, Par. XVII).

I

AS TO THE DAMAGES

Plaintiffs cannot recover for an error where there was no loss. They received the highest price which the market afforded for the barley, notwithstanding the error, and they do not claim they could have sold it for more. On the contrary, it is stipulated that the price offered by the

true message of February 25th and which price was actually received by them "was the best price which said F. Green & Co. could secure at that date," and in the message itself plaintiffs' own agent, Green & Company, stated that such price was "considerably best offer yet made this position" (Agreed Statement, Par. VI).

It may be true, as contended by plaintiffs in error that they had a right not to sell their goods, but if this be true and the right not to sell were violated through defendant's error, plaintiffs can only recover what was lost as a result, and unless it appears there was a loss, there can be no recovery. Plaintiffs suffered no injury. The measure of damage is the difference between the price at which they sold and the price which they could have obtained for the barley had they not been misled by the message. But it is admitted that they received the highest market price. It does not appear they could have sold for more or that the barley was worth more. In fact plaintiffs have not shown, nor do they even contend, that they sustained any actual loss. Their contention is that they did not receive what by reason of the erroneous message they *expected to receive.* Their chief assignment of error is that

> "the Court erred in deciding that in this case the measure of damages is not the difference between what the seller receives for his property and *what he thought he was going to receive*" (Tr., p. 43).

We contend this would have been a false rule for the admeasurement of damage. If such were true then the defendant would be liable, not in the amount of the loss sustained by plaintiff but according to the magnitude of the error in the message regardless of the actual loss or the condition of the market, even though plaintiffs, as in this case, received the highest market price. If plaintiffs had received in this case what they expected from the erroneous message to receive, they would have obtained $2456 more for their barley than they asked for it. If the error in the message had chanced to be even more serious and have purported to offer $10,000 or $20,000 more than they obtained, then under plaintiffs' contention they would have been entitled to recover in damages this larger sum, not because they lost it, but because they expected it. Or, stating the case in another form, if another merchant had at that time been offered the same price of 62s. 6d. for a similar cargo of barley, but by error in the telegram had been led to believe that he was to receive $20,000 more for the barley than was actually offered, then, under the rule contended for, one merchant would recover $6970, and the other, under the same market conditions, would obtain a much larger sum in damages, although neither of them had sustained any loss.

Counsel contend, pages 7-8 of Brief, that the plaintiffs here can recover damages, even if it appear as a fact that plaintiffs could never have obtained a higher sum for the barley, or even if they could have re-

placed it by other barley of the same quality at a smaller price. It is urged that plaintiffs do not have to show an actual loss but only a *prima facie* loss, and that this is proven when it is shown that they did not receive what they *expected* to receive. But damages must be actual and certain. The burden of showing the actual loss is upon the plaintiffs. It is not shown that had it not been for the error, plaintiffs would have realized more than they did receive for the barley. The weakness of plaintiffs' claim is that they have singled out one item of expense among many in a general transaction, which they were required to pay, and allege that they were damaged in that amount, notwithstanding the fact that on the whole, the transaction proved fortunate.

PLAINTIFF'S AUTHORITIES

The cases cited to show that plaintiffs were entitled to recover on the basis of what "he thought he was going to receive" do not bear out that rule. If they did they would state an unsound principle of law. The citation from *Jones on Telegraph and Telegraph Companies* shows that the measure of damage is "the amount of *actual loss* caused by the *decrease* in the price he obtained."

The case of *Reed* vs. *Western Union,* 34 L. R. A. 492, cited by plaintiff, is in fact authority for defendant. The case clearly states that where by reason of an error in a telegram the plaintiff received less for her land than she expected to receive,

"We think the proper measure of damage under the circumstances was the difference between the *actual market value of the lot* and the price received by the mistake." (See page 498.)

In *Hollis* vs. *Western Union Telegraph Company,* 18 S. E. 287, counsel would have some support for his contention had the Court not gone on to say *"provided his loss amounted to that much."*

In this case it is not shown there was any loss at all. It was not shown that the market value of the barley was greater than the price received. Plaintiffs' rule finds no support in the authorities.

The pertinent part of the Opinion of the Court below in this cause, found at pages 38-42 of the Transcript, is as follows:

"There is nothing in the record to indicate, even remotely, that the intending purchaser or any other purchaser, would have paid more for the barley than was actually paid" (Tr., p. 40).

"So here, there is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action or even up to the present day. On the other hand, if they would have held or kept the barley for their own use there is nothing in the record to indicate that they could not have purchased barley of like kind and quality even at a less price than that actually received.

In other words, for aught that appears in the record the plaintiffs may have profited greatly by the mistake" (Tr., p. 41).

A case in all respects like the present one is found in the Supreme Court of Iowa, entitled *Micklewait* vs. *Western Union Tel. Co.,* 84 N. W. 1038.

Plaintiffs in that case were dealers in grain. A telegram was sent to them by one Russell offering to buy corn at 20½c per bushel. As delivered, the message read 21½c per bushel. Plaintiffs then purchased 18,200 bushels of corn for $3,658, for which they expected, at 21½c, to receive $3,913, but the real offer being but 20½c, they received only $3,731, which sale, however, yielded a profit of $73. The following language of the Opinion of the Court has direct application to our present case. The Court says:

"The mistake in the message caused them no loss of profits; for if it had been correctly transmitted they would have been in the same situation they now are. They obtained from Russell the exact price fixed in his message as it should have been sent. . . . It is wholly unnecessary to cite authorities to show that plaintiffs cannot recover damages without first showing some injury."

Plaintiffs in that case fully expected to derive a profit of $255, but the market conditions, that is, the price actually offered, yielded them a profit of $73,

which was all the corn was worth, and this they received, notwithstanding the error of the message. They were not permitted to recover more because they expected to receive more.

In the present case the plaintiffs in error derived a profit of $30,000 on the whole transaction after paying the war risk. They *expected* to derive a profit of $36,970, but this was $2456 more than they offered to sell for, and more than the offer which the buyers had declined, so that instead of sustaining an actual loss they, as in the Micklewait case, derived a large profit.

On the question of certainty of damages as applied to the facts here, the case of *Western Union Tel. Co.* vs. *Hall,* 124 U. S. 444, 31 L. Ed. 279, is instructive. The plaintiff on November 9th sent a message to his broker to buy 10,000 barrels of petroleum. The message should have been delivered by noon of that day, when the market price of oil was $1.17 per barrel. Through the negligence of the telegraph company the message was not delivered until 6 p. m. of that day, after the exchange had closed, and the next day the price had advanced to $1.35 per barrel. Plaintiff brought suit and recovered judgment in the lower Court for $1,800, being the difference in the two prices. This judgment was reversed by the Supreme Court, which held that plaintiff was entitled only to recover nominal damages. The Court said (p. 483):

> "All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."

In *Western Union* vs. *Waxelbaum,* 113 Ga. 1017, 56 L. R. A. 741, the plaintiffs sent a telegram inquiring the price at which they could buy eggs. A telegram in reply was sent, stating that the lowest price was 16½c. The message as delivered to plaintiffs read 15½c. On the faith of the telegram, as received, Waxelbaum ordered a shipment of eggs but was required to pay 16½c per dozen, the actual price at which they were offered. Suit was instituted to recover the difference from defendant. The Supreme Court said,

> "it is not satisfactorily shown that if the telegram had been properly transmitted plaintiffs would have received any more for the eggs than they did receive."

In *Acheson* vs. *Western Union Tel. Co.,* 96 Cal. 641, an error occurred in a message relating to the purchase of a lot of hops. Plaintiff alleged that by reason of the error he was prevented from buying 152 bales of hops at 8½c per pound, and was thereby damaged in the sum of $684. Judgment for plaintiff

was *reversed* because complaint did not state a cause of action. The Court said:

> "The gist of the action is for the recovery of special damages, and there is no allegation of special damage. Nominal damages only were recoverable on the complaint. If plaintiff suffered special damage by the failure to purchase certain hops, there should have been averments under which evidence of such special damage, and the facts upon which it rested, could have been introduced. No damage, unless nominal, necessarily resulted from the alleged breach of contract. *There is nothing to show that plaintiff suffered any loss because he did not buy the hops at the named price; he may have saved money by not making the purchase.*"

II

PLAINTIFFS HAD CAUSE TO KNOW OF THE ERROR IN THE MESSAGE BEFORE ACCEPTING THE OFFER

It is an accepted rule of law that the receiver of a message has no right to act upon it *if he has reasonable ground to suspect that the message has been altered or is in any other respects untrue.* The rule in this regard is stated by *Gray on Telegraphs* (Par. 76) as follows:

> "Where one who receives a telegram has reasonable ground to suspect that the message is

altered or in other respects untrue, he must, before acting upon it, assure himself, by repetition or other means, of its correctness. If without doing so he acts upon the telegram, which, as a matter of fact, is, owing to the negligence of the telegraph company, incorrect, he is guilty of contributory negligence, defeating his right of action. It is wholly immaterial, of course, whether his knowledge of the probability of error is derived from an ambiguity upon the face of the message or from other sources."

The price offered the plaintiffs by the message of February 25th, *as delivered,* being larger than the price at which plaintiffs had offered to sell, and more than the buyers in same message declined to pay, plaintiffs had sufficient and reasonable cause to suspect and even to know that there was an error in the cablegram, and it was their clear duty before acting upon the message, particularly in a transaction of such magnitude, to have the offer verified by a repetition of the message or otherwise. Their own negligence in thus acting upon the message, *which disclosed error upon its face,* contributed to the loss, if any, and will defeat plaintiffs' right of action. Buyers do not ordinarily offer more for goods than the seller asks for them. Here the seller by the first message offered the cargo of 15,105 quarters at 63s. 9d. or $15.17¼ per quarter, and agreed to pay the war risk of $6970. This would have yielded them, after paying the war risk, $22,210. The buyers, through the message of

February 25th, declined this offer but, according to the message *as delivered,* made a counter offer, which would have yielded plaintiffs the net sum of $224,686. The mathematics of the case cannot be denied.

Exchange being $4.76, at the time, 63s. 9d. was equal to $15.17¼ and 62s. 6d. was equal to $14.87½.

15,105 quarters at $15.17¼ equals.....$229,180
Less war risk (to be paid by sellers).... 6,970

Sellers offer (net).....$222,210
15,105 quarters at $14.87½ equals.....$224,686

It will thus be seen that as the message was delivered it appeared to offer plaintiffs several thousand dollars more for their barley than they asked.

When the message was received by plaintiffs declining their offer but making a counter offer for $2456 more than plaintiffs asked and which the buyers, by the same message, declined to pay, plaintiffs might safely have assumed there was something wrong. Plaintiffs could have guarded against the risk of loss by having the message repeated, or, instead of answering as they did, "Offer accepted," etc. (Tr., p. 27), made the message read "Offer of 62s. 6d. not including war risk accepted."

THE CASES ON CONTRIBUTORY NEGLIGENCE

The rule as stated by *Gray on Telegraphs* was quoted above.

Jones on Telegraph and Telephone Companies (2d ed.) section 333, states the rule as follows:

> "But if there is anything in the message itself which would lead him (the addressee) to believe that an error had been made, or if there are any circumstances connected with it which, with reasonable prudence, would lead him to suspect that an error had been made, he will be guilty of contributory negligence if he fail to inquire into such information when the opportunity is afforded."

In *Croswell on Electricity,* at paragraph 431, the rule is stated thus:

> "It has been held that if a person receiving a telegraph message has extrinsic information which leads him to suspect that the telegraph message as received by him may be incorrect, he is guilty of contributory negligence if he acts upon the telegram without making any effort to ascertain whether or not it is correctly transmitted."

Under the subject of contributory negligence in relation to telegraphic messages, the following is the rule given in 37 Cyc. p. 1760:

> "As in other civil actions, plaintiff may be precluded from recovering damages by reason of

his own contributory negligence, as where in the case of a message incorrectly transmitted plaintiff assumes to interpret and act upon it, although as delivered to him it is unintelligible, *where he acts upon such a message without attempting to verify its correctness, although having reasonable cause to suspect* that it has been incorrectly transmitted."

In *Germain Fruit Co.* vs. *Western Union Tel. Co.,* 137 Cal. 598, the message was sent by plaintiff to Cornforth & Co., quoting a price of Riverside oranges at $2.60 per box. The message was changed in transmission and as delivered meant $1.60 a box. The addressee accepted the offer. The Court found that the price of oranges was so much greater than that named in the message that Cornforth & Co. *"had reason to believe there was a mistake" in the message and did not act in good faith in sending their orders for two carloads of the oranges without verifying the correctness of the message.* The Supreme Court said, page 601:

"That Cornforth & Co. did know the market price of Riverside oranges at Denver and at Los Angeles, which was considerably more than $1.60 per box, and *'sufficiently to put Cornforth & Co. on inquiry as to whether or not said telegram was correct and they made no inquiry and took no steps to ascertain the correctness of said telegram.'"*

It was held that this failure to inquire as to the correctness of an unrepeated message, where the con-

tents gave good reason to suspect error, was negligence sufficient to preclude the recovery of damages.

In *Willoughby* vs. *Western Union Tel. Co.,* 133 N. Y. Supp. 269, an agent for the owner and manager of a theater telegraphed his principal as follows:

> "Letters from Tennis. If he can arrange date for 'Grace George' probably April 7th will you accept the following terms. She to take the first six hundred dollars, you the next one hundred and fifty dollars, then seventy-five twenty-five. Must have a quick answer. Wire me."

A telegram came back from the principal to the agent which read as follows:

> "If she don't play Johnstown all right first one fifty."

Acting upon the latter telegram, the agent made a contract to play Grace George upon the terms named in the telegram sent by him, from which action on his part damage to his principal ensued.

The following is the reasoning of the Court upon the above facts:

> "The only telegrams seen by the agent were the two, the contents of which are above given. It seems quite apparent that the telegram of the principal is not in response to the telegram of the agent. While it contains the words 'All right,' which would signify that the terms mentioned were satisfactory, the propriety of drawing such

an inference therefrom is destroyed by the words 'first one fifty' in the original proposal either for Grace George or for the principal. It seems clear that a man of ordinary intelligence and prudence would have known at once from the reading of these two telegrams that the latter was not in response to the former, and did not authorize the contract to be made as proposed in the telegram of the agent and that some error had been made in the transmission of one or the other of the telegrams, or in the reading or the sending of one or the other by the principal. It was therefore a negligent act on the part of the agent to make the contract, having as his authority only the telegram received from his principal. Such negligence was the proximate cause of the injury done. It is immaterial, therefore, that there was negligence on the part of the defendant in transmitting the message from the agent to the principal, for the chain of causation between it and subsequent damage was broken by an intervening negligent cause sufficient in itself to accomplish the result which followed."

See, also, the following cases:

Manly Mfg. Co. vs. *Western Union Tel. Co.,* 105 Ga. 235, 31 S. E. 156;
Western Union Tel. Co. vs. *Wright,* 18 Ill. App. 337;
Hasbrouck vs. *Western Union Tel. Co.,* (Iowa) 77 N. W. 1034.

III

PLAINTIFFS ARE BOUND BY THE TERMS AND CONDITIONS OF THE MESSAGE CONTRACT AND ESTABLISHED REGULATIONS AS TO LIMITED LIABILITY

The message in suit was an *unrepeated message* written on one of the regular blanks of the telegraph company used for transmitting cablegrams. It was sent subject to the conditions as to rates and liabilities printed thereon, to which the plaintiffs, through their agent, expressly agreed. On the face of the message was written the separate agreement signed by Green & Co. as follows:

> "Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph Cable System, *subject to the said conditions to which I agree.*
>
> F. GREEN & CO."
>
> Signature F. Green & Co., Address 13 Fenchurch Avenue, London. E. C. W.

The conditions referred to in the above are set out upon the back of the message, found in Paragraph XIV of the Stipulation and are as follows:

> "All important Telegrams should be repeated, for which an additional quarter rate is charged.
>
> "CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.

"The Company will refund to the Sender the charges paid by him for any Telegram which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

"The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the non-transmission or non-delivery of the Telegram, or delay, or error in the transmission or delivery thereof, however such non-transmission, non-delivery, delay or error shall have occurred."

The defendant received for the transmission and delivery of this message

"the sum of $10 and no more, which sum was defendant's ordinary and reasonable charge for the transmission and delivery of *said message as an unrepeated message, under the conditions set forth in said contract*" (Par. XVII of Stipulation).

It is here stipulated by the parties to this action that the message was sent *"under the conditions set forth in said contract."* By the terms of the contract defendant was not to be held liable for error beyond the amount paid for the transmission. The rate paid was based upon this measure of liability.

THE VALIDITY OF THE CONTRACT

There was formerly much conflict in the opinions of the Courts respecting the validity of these stipulations. The recent decisions of this Court and of the Supreme Court of the United States make it unnecessary to review the earlier opinions. The message was sent in interstate commerce and is controlled by the provisions of the Interstate Commerce Act, as amended June 18, 1910. (U. S. Compiled Statute, Secs. 8563, et seq.) It is there provided that messages by telegraph, etc., may be classified into *repeated and unrepeated messages, and such other classes as are just and reasonable, and different rates may be charged for different classes of messages.* It is further provided, Sec. 8565, that no carrier subject to the provisions of the Act shall give "any undue or unreasonable preference or advantage," etc. This Court, in the recent decision of *Czizek* vs. *Western Union Telegraph Co.,* 272 Fed. 223, had occasion to deal with these provisions of the law and to review the decisions of the Supreme Court of the United States in *Postal Telegaph-Cable Co.* vs. *Warren Godwin Lumber Co.,* 251 U. S. 27, and *Western Union* vs. *Boegli,* 251 U. S 215, and the decision of the Interstate Commerce Commission in *Cultra* vs. *Western Union Tel. Co.,* 44 I. C. C. R. 670, approved by the Supreme Court. In all those cases the validity of the stipulations relating to unrepeated messages was affirmed. This

Court in the Czizek case decided such stipulations could not be held to apply to a case of non-transmission or a total failure to place the message in course of transmission. But here the error was an error of transmission occurring on the land lines of the defendant between New York and San Francisco.

ESTEVE BROTHERS CASE

Since the decision of this case in the Court below, the Supreme Court of the United States has decided the case of *Western Union* vs. *Esteve Bros.* (June 1, 1921), No. 16 Adv. Op., p. 653, reversing the Opinion of the Circuit Court of Appeals for the Fifth Circuit. We may safely rest the decision of this case upon that authority. There, as in this case, the suit arose from an error in an unrepeated cable message. The message originated in Spain and was transmitted correctly by the Western Union over its cable to New York and thence over its land lines to New Orleans. The message, as filed, directed the sale of 200 bales of cotton. It was so changed in transmission as to direct the sale of 2000 bales of cotton. The error in transmission occurred on the land lines of the Western Union between New York and New Orleans. The message was an unrepeated message. The plaintiffs in filing the message did not in fact assent to any limitations of liability at all. They did not use the blank containing the provisions so limiting the liability and had no actual knowledge of the filing of

the tariffs with the Interstate Commerce Commission. The Agreed Statement of Facts in the present case (Par. XVI, Trs. p. 30) shows that pursuant to the provisions of the Interstate Commerce Act the defendant here had established various classes of messages referred to in the Act and among others into *repeated* and *unrepeated messages,* and had established different rates of toll with respect to such different classes of messages and had filed such rates and regulations with said Interstate Commerce Commission. In the *Esteve* case, plaintiffs contended, and it was held by the Circuit Court of Appeals, that they were entitled to a verdict for the full amount of their loss. The Company contended that since the message had not been repeated, the judgment should be for the amount of the tolls. This contention was upheld by the Supreme Court. The Supreme Court says:

> "The question presented for our decision is whether, since the amendment of June 18, 1910, to the Act to Regulate Commerce, the sender is without assent in fact bound as a matter of law by the provision limiting liability, because it is a part of the lawfully established rate."

The Act permits the telegraph company to establish rates and classifications but does not require them to be filed. The Court says:

> "But the rate, long before established, then formally adopted and filed, was thereafter the

only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. *Postal Telegraph-Cable Co.* vs. *Warren-Godwin Lumber Co.,* 251 U. S. 27, 30, 64 L. ed. 118, 120, 40 Sup. Ct. Rep. 69; *Cultra* vs. *Western Union Telegraph Co.,* 44 Inters. Com. Rep., 670-674.

"The lawful rate having been established, the Company was, by the provisions of Section 3 of the Act to Regulate Commerce, prohibited from granting to anyone an undue preference or advantage over the public generally. For, as stated in *Postal Telegraph-Cable Co.* vs. *Warren-Godwin Lumber Co., supra,* 30, the 'Act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates.' If the general public, upon paying the rate for an unrepeated message, accepted substantially the risk of error involved in transmitting the message, the Company could not, without granting an undue preference or advantage, extend different treatment to the plaintiff here. The limitation of liability was an inherent part of the rate. The Company could no more depart from it than it could depart from the amount charged for the service rendered.

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common-law liability from which they might or

> might not extricate themselves, according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not, as before, a matter of contract, by which a legal liability could be modified, but as a matter of law, by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

The Court further says that both railroad and telegraph rates are initiated by the carrier and that the railroad rate does not have the force of law unless it is filed with the Commission, but

> "it (Congress) did not make filing with the Commission a condition precedent to the existence of a lawful telegraph and cable rate. *When, therefore, the Western Union initiated and established this reasonable rate the principle of equality and uniformity laid down in Section 3 required that it should have exactly the same force and effect as the rate initiated by a rail carrier and filed according to the provisions of Section 6.*"

The plaintiffs may attempt to invoke the rule of *U. P. R. R. Co.* vs. *Burke,* referred to in the above

case, and claim the Esteve Bros. case is not controlling because the stipulation in the message contract provided for no greater liability in the case of repeated than of an unrepeated message. But, says the Court, in the latter case (p. 656):

> "It is by no means clear that the rule of the Burke case—established for common carriers of goods—should be applied to telegraph and cable companies. See the *Primrose* case, 154 U. S., p. 14, 38 L. ed. 889, 14 Supt. Ct. Rep. 1098. In any event, it is not applicable here. The Western Union did not, as in the case of telegrams, offer to send cable messages upon a special valuation to be made by the sender and paid for by an extra charge 'based upon such value equal to 1/10 of 1 per cent thereof.' *But it offered alternative rates for repeated and for unrepeated cable messages.* This long-established classification was expressly recognized as just and reasonable for cable as well as for telegraph messages in the amendment made by the Act of June 18, 1910, to Section 1 of the Act to Regulate Commerce."

What the liability would be for an error in the case of a repeated message, this Court has no occasion to decide in this case. The facts in the Esteve Bros. case was in all respects similar to the circumstances of the present suit and that case is controlling on the issue of the validity of the agreement as to an unrepeated message. The Court says in the last paragraph (p. 656):

"The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security. Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored, by having the message repeated, to secure the greatest care on the part of the Company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the unrepeated rate that another special rate was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it."

The language of the above paragraph has direct application to the present case. The message here was one of "value and importance." The Company offered another special rate for messages of this character. The sender was advised that *"all important telegrams should be repeated, for which an additional quarter rate is charged."* The repeated rate, offering greater accuracy, was open to any one who wished to pay the extra amount for extra security. The repetition of the message in this case would have disclosed the error and avoided any possibility of loss. But by choosing the rate for the unrepeated message the sender accepted substantially the risk of error. As said by the Court in the Esteve Bros. case:

"The limitation of liability was an inherent part of the rate. The Company could no more depart from it than it could depart from the amount charged for the service rendered.". . .

"Uniformity demanded that the rate represent the whole duty and the whole liability of the Company."

We repeat the language of the Supreme Court in *Postal-Telegraph Co.* vs. *Warren-Godwin Lumber Co.,* 251 U. S. 27. See page 30, interpreting the Interstate Commerce Act as applied to the liability of the telegraph companies in respect to unrepeated messages. The Court says:

"In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.

"In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the

power thus given, limited, of course, by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.

"In the third place, as the Act expressly provided that the telegraph, telephone, or cable messages to which it related may be 'classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages,' it would seem unmistakably to draw under the Federal control the very power which the construction given below to the Act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that, as pointed out by the Interstate Commerce Commission (*Cultra* vs. *Western U. Teleg. Co.,* 44 Inters. Com. Rep. 670), from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest."

The Court further says that the question is "persuasively settled by the decision of the Interstate Commerce Commision in" *Cultra* vs. *Western Union Tel. Co.,* 44 I. C. Rep. 670, and by the "careful

Opinion of the Circuit Court of Appeal of the Eighth Circuit dealing with the same subject in *Gardner* vs. *Western Union Tel. Co.,* 231 Fed. 405, and by numerous and conclusive opinions of State Courts," which are cited in the opinion.

See also

Western Union Tel. Co. vs. *Boegli,* 251 U. S. 215

and the decision of this Court in

Czizek vs. *Western Union,* 272 Fed. 223.

THE DEGREE OF NEGLIGENCE

Plaintiffs in error may claim that the defendant in error is not absolved from liability by these stipulations because the error complained of amounted to gross negligence. Such contention was made in the lower Court. It is answered by the decision of the Supreme Court in the Esteve Bros. case, supra. Here the error consisted in the insertion of the word "not," which altered the meaning of the message, resulting in a change of price of approximately $7000. In the Esteve Bros. case the error consisted in the change of the words "200 bales" to "2000 bales," which resulted in a loss of $31,000. The error in the one case was no greater than the other.

Gross negligence arises where there is evidence of wilful misconduct or intentional wrong. The proof of error furnishes presumption of negligence but not of gross negligence. Where wilful or intentional wrong

is charged, or, in other words, where gross negligence is alleged, it must be proven. There must be proof of independent facts showing some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences. See

Williams vs. *Western Union,* 203 Fed. 140;
White vs. *Western Union,* 14 Fed. 710;
Jones vs. *Western Union,* 18 Fed. 717;
Hart vs. *Western Union,* 66 Cal. 584;
Redington vs. *Pacific Postal Co.,* 107 Cal. 317;
Coit vs. *Western Union,* 130 Cal. 567.

In the Redington case the language of the Court is as follows:

> "The onus, then, of proving wilful misconduct or gross negligence on the part of the defendant devolved upon the plaintiff, *and is not, in the face of the stipulation, to be presumed from the mere fact of a mistake, but must be proven by independent facts, or by circumstances connected* with the principal fact, and warranting the conclusion or inference of wilful misconduct or gross negligence."

In that case proof was offered of the incompetency of the operator.

In the Hart case the Court held that the plaintiff, in the face of the stipulation, could not recover for the error shown "except by proving wilful misconduct for gross negligence on the part of the defendant."

In *White* vs. *Western Union,* 14 Fed. 710, the error consisted of the change of the word "fifteen" to the word "fifty." The Court said (page 713):

> "the burden rests upon the plaintiffs to show that this error or mistake occurred through the *culpable negligence or gross carelessness* of the operators or employes of the defendant company. *It is not sufficient for them to say there is a mistake which has occurred in transmitting this dispatch to the office of the company in St. Louis, but they must show that it occurred through the gross carelessness or culpable negligence of the employes of the defendant company."*

In *Jones* vs. *Western Union Tel. Co.,* 18 Fed. 717, the error was the change of the word "Chicago" to the word "cheap." The Court said:

> *"The plaintiff has offered no evidence of negligence on the part of the defendant other than that the message as delivered differed from the message as written in the particular mentioned. . . .* It is sufficient to say that the weight of authority and the ablest and best reasoned cases establish the doctrine that the conditions contained on the blank, on which the plaintiff wrote his message and to which he assented, are reasonable and valid to the extent of protecting the telegraph company from damages for any error or mistake occurring in the transmission of the message, unless it is shown affirmatively that such error or mistake was the result of gross negligence or fraud on the part

> of the company; *and that mere proof of the fact that there is a mistake of a word or a figure in the message is not sufficient evidence of negligence or fraud to render the Company liable beyond the amount stipulated for in the contract of the parties.*"

The case of *Pegram* vs. *Western Union,* 2 Southeastern 256, resembles somewhat the case of *Redington* vs. *Pacific Postal Tel. Co.,* in California, in that the error consisted in dropping a part of a word. The plaintiff did not rely upon simple proof of error, as indicated by plaintiff here, *but introduced evidence of independent facts,* tending to show gross negligence. The Court said:

> "This case is clearly distinguishable from *Lassiter* vs. *Telegraph Co. In that case the mere fact of the mistake was the only evidence of negligence.* Number of words sent was the number of words received. There was no evidence as to how the mistake occurred; and no evidence of carelessness or incompetency on the part of the agents of the company, nor was there anything to indicate that the message was of special importance."

In *Western Union* vs. *Neill,* 44 Amer. Rep. 589, the error was in the change of the word "have" for the word "home." The plaintiff had judgment and the case was reversed.

The Court said:

> "We are further of opinion that the mere fact that there may have been an error in the message as received by the operator at Austin and delivered to appellee Neill, *is not of itself sufficient proof of negligence* to entitle the plaintiff to recover, as the error may reasonably be referred to some other cause, embraced within the exemption clause contained in the contract. *Aiken* vs. *Tel. Co.,* 5 S. C. 367; *Sweetland* vs. *Tel. Co.,* 27 Iowa 455; s. c. 1 Am. Rep. 285; *Tel. Co.* vs. *Gildersleeve,* 29 Md. 248."

In *Kiley* vs. *Western Union Tel. Co.,* 109 N. Y. 231, the message was delayed, in consequence of which the plaintiff suffered damage for which he recovered judgment. The case was reversed. The Court after holding the stipulation to be binding, said:

> "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went as far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there, remains unexplained. It was not shown that the failure was due to the *wilful misconduct of the defendant, or to its gross negligence.* If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and

the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation."

In *Grinell* vs. *Western Union Tel. Co.,* 113 Mass. 299, 18 Am. Rep. 485, the error consisted in the omission of a word from the message. The Court in an Opinion written by Chief Justice Gray, says:

> "There was no offer at the trial to show any wanton disregard of duty or gross negligence on the part of the Company or its agents. The offer to prove that 'there was negligence on the part of the operator,' in not sending the whole message received, must be understood to mean want of ordinary care."

In the Primrose case, supra, where the principal error consisted in the change of word "bay" to "buy," the Court said:

> "The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message."

It seems to us if the Court will examine the message in suit as it is found in paragraphs VI and VII, it will be seen that the insertion of the word "not" is an error which might easily be made, and under no theory can it be assumed that an operator would change the message either wilfully or intentionally. The word "not" occurs in two other places in the message and it is not an uncommon mistake in typing or copying, for a word in the text like this, to be repeated, or for the subject matter between two identical words to be omitted.

Under the clear rule of law the Court cannot find there was any gross negligence or wilful or intentional wrong, and without independent proof of facts which show wilful misconduct and gross negligence, plaintiffs cannot recover.

We respectfully submit that

(1) Plaintiffs sustained no loss.

(2) Plaintiffs had reasonable cause to know of the error in the message before accepting the offer.

(3) Plaintiffs were bound by the terms and conditions of the message contract and established regulations as to limited liability.

Dated: San Francisco, October 14th, 1921.

Respectfully submitted.

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